United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

APPEAL NO. 19,323

HABEAS CORPUS 51-65

Keyworth C. Birch, Jr.,

Appellant

v.

Sam A. Anderson,

Appellee

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APPEAL FROM A JUDGMENT OF THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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July 2, 1965

QUESTIONS PRESENTED

1. How should 18 U.S.C. 4164 be interpreted insofar as it concerns custody and jurisdiction of a parole board over a parolee during the last 180 days of the maximum term of his sentence?

2. Is a parole board violation warrant effective when the same is issued and executed after the parole board has lost jurisdiction and custody over the parolee thereby affected?

3. When a parole violation occurs prior to the 180 day period specified in 18 U.S.C. 4164, may a parolee be retaken on a warrant issued and executed during such 180 day period?

4. May a parole board indefinitely and arbitrarily delay the retaking of a parolee after a parolee violation and still retain the power to retake for such violation?

Keyworth C. Birch, Jr.,

Appellant

v.

Sam A. Anderson,

Appellee

APPEAL NO. 19,323

HABEAS CORPUS 51-65

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review the judgment below rests on 28 USC 1291

STATEMENT OF CASE

Appellant was convicted in the United States District Court for the Southern District of Texas of violations of the Federal Narcotics Laws and on September 17, 1959 was sentenced to serve a term of five (5) years imprisonment. He was released on a conditional good-time release on February 18, 1963.

A parole board violation warrant was issued on June 25, 1964 and executed December 18, 1964. The warrant was based on alleged parole violations as follows:

1. Theft charge alleged to have occurred December 5, 1963, which charge was dismissed for lack of evidence; and

2. An arrest January 9, 1964 in the District of Columbia for violation of the Uniform Narcotics Act, for which Appellant was convicted and sentenced to serve 360 days inprisonment (Criminal Case No. U.S. 1284-64).

In the affidavit of the parole officer which accompanied the parole board violation warrant it was admitted that the board was immediately notified after each of the above enumerated alleged parole violations.

Appellant is currently imprisoned as a result of revocation of his parole based on the aforesaid parole board violation warrant.

Appellant filed a petition for issuance of a writ of habeas corpus for release from illegal detention under the said parole board violation warrant, which petition was dismissed and this appeal followed.

It is Appellant's position that:-

1. Under the provisions of 18 USC 4164, Appellant was unconditionally released from jurisdiction of the parole board on or about March 22, 1964, and the board accordingly did not have jurisdiction and custody over him at the time of issuance of the parole board violation warrant; and

2. That the unconscionable delay by the parole board in issuance of a parole board violation warrant and revocation of parole (201 days after the first alleged violation and 167 days after the second) deprived Appellant of due process of law.

Accordingly, it is respectfully submitted that Appellant's present detention under the terms of violation of parole as above enumerated is illegal and he should be forthwith released.

STATUTES INVOLVED

18 USC 4164, Public Law 62, 82nd Congress, 1st Session, 76 Stat. 552.

RELEASED PRISONER AS PAROLEE

"A parolee having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

This section shall not prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody."

STATEMENT OF POINTS

I - 18 USC 4164 must be interpreted to mean that the prisoner on parole therein referred to is unconditionally released from custody and jurisdiction of the parole board for the last 180 days of the maximum term for which he was sentenced.

II - The acts of a parole board in issuance and execution of a parole board violation warrant after it has lost juridsiction and custody of a parolee are void ab initio.

III - Any action taken by the parole board for a parole violation must be taken prior to the 180 days period specified in 18 USC 4164.

IV - The unconscionable delay of the parole board in exercising its powers of revocation of the parole of Appellant deprived Appellant of due process of law.

SUMMARY OF ARGUMENT

I - The bill originally presented as H. R. 2924, 82nd Congress, 1st Session, Companion Senate Bill S. 1366, House Report No. 314, and Senate Report No. 385, when taken together in interpretation of 18 USC 4164, compel the conclusion

that 18 USC 4164 must be interpreted to mean that the prisoner therein referred to is unconditionally released from custody and jurisdiction of the parole board for the last 180 days of the maximum term for which he was sentenced.

II - The sentence of Appellant having expired by operation of law on or about March 22, 1964, jurisdiction and custody over Appellant by the parole board likewise expired on the same date, and the actions of the parole board in issuing and execution of a parole board warrant after such loss of jurisdiction and custody is a nullity.

III - In order that a parolee be retaken for a parole violation, it is necessary not only that the violation shall have occurred prior to the 180 day period specified in 18 USC 4164, but also that a parole board violation warrant for the retaking shall have issued prior to such 180 day period.

IV - The unconscionable delay by the parole board in exercising its power of revocation of the parole of Appellant comprised an exercise of such power at the whim or caprice of the parole officers and deprived Appellant of due process of law.

ARGUMENT

I

18 USC 4164 must be interpreted to mean that the prisoner on parole thereon referred to is unconditionally released from

> custody and jurisdiction of the parole board for the last 180 days of the maximum term for which he was sentenced.

The provisions of 18 USC 4164 with which we are herein concerned read as follows:

> "A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days."

The Bill of Congress which matured in Public Law 62, 82nd Congress, Chapter 176, 1st Session, the act which amended 18 USC 4164 to read as above quoted, was H. R. 2924, 82nd Congress, 1st Session, the pertinent portions of which read as follows:-

> "A prisoner having served the term or terms for which he shall have been sentenced after June 29, 1932, less good-time deductions, shall be unconditionally released if there remain less than one hundred and eighty days to serve. If there remain one hundred and eighty days or over to be served, he shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days."

It is to be noted that present 18 USC 4164 has wording which differs slightly from that of the original bill. However, as stated in the report with respect to original H. R. 2924, House Report No. 314, 82nd Congress, 1st Session, page 4:-

> "The committee amendments are designed for purposes of clarification and simplification."

The intent and purposes of 18 USC 4164 thus remain the same as those of original H. R. 2924 and companion Senate Bill S. 1366, such purposes and intent being as stated in Senate Report No. 385, 82nd Congress, 1st. Session, accompanying H.R. 2924:

> "The purpose of this bill.....is to amend Section 4164 so as to provide that a prisoner who has served his sentence, less good-time deductions, shall be released unconditionally if there remain less than 180 days to serve under the maximum term or terms of his sentence;...."

18 USC 4164, as amended, was obviously intended to serve the convenience of the government in enabling the government to avoid the expenses of retaking and transporting prisoners when such prisoner was on parole and had 180 days or less left to serve under the maximum term or terms of his sentence. In order to provide this convenience to the government, it was necessary, in effect, to remit the last 180 days of the maximum term of such prisoner's sentence. Thus, although present 18 USC 4164 does not mention the matter of unconditional release as set forth in the original bill, the deletion of wording to this effect was merely for purposes of "clarification and simplification" and 18 USC 4164 must be interpreted to mean that the prisoner on parole therein referred to is <u>unconditionally</u> released from custody and jurisdiction of the parole board for the last 180 days of the maximum term for which he was sentenced.

II

The acts of a parole board in issuance and execution of a parole

board violation warrant after it has lost jurisdiction and custody of a parolee are void ab initio.

As a background for construing 18 USC 4164, as it applies to Appellant herein, it is necessary to determine the effect of actions taken by the parole board after it has lost custody of and jurisdiction over a parolee.

In the present case, as attested to by the affidavit of the parole officer which accompanied the parole board violation warrant, the alleged parole violations were each promptly reported to the parole board and thereafter, as before, Appellant continued his regular monthly reports to the parole board. Appellant thus made no attempt to escape or avoid regular contact with the parole board. The parole board thus had notice of the alleged violations of parole in ample time to effect a retaking of Appellant prior to the beginning of the 180 days period referred to in 18 USC 4164, and had regular contacts with the Appellant, so that such retaking could be very easily accomplished at any time. However, the parole board chose not to take any action with respect to the alleged parole violations for a considerable period of time, holding up issuance of a parole board violation warrant until 201 days after the first alleged violation and 167 days after the second.

By operation of law (18 USC 4164 providing for unconditional release of Appellant March 22,1964) the sentence imposed upon Appellant by the United States District Court for the Southern District of Texas had expired. Such sentence having

expired by operation of law, it is clear that the parole board had lost jurisdiction over Appellant at the time of both issuance and execution of the parole board violation warrant and that, after March 22, 1964, no parole existed which could form a basis for issuance and execution of a parole board violation warrant. Cf. Crooks v. Sanders (S.Ct. South Carolina - 1922) 115 S. E. 760, 28 ALR 940; and Hyche v. Reese (DCSD Miss. - 1945) 61 F. Supp. 646.

III

Any action taken by a parole board for a parole violation must be taken prior to the 180 day period specified in 18 USC 4164.

Courts in the 9th and 10th Circuits have taken the position that where the parole violation occurs prior to the 180 day period set forth in 18 USC 4164, a parole board violation warrant may be issued during the 180 day period. Taylor v.Goodwin (CA 10th Circ. - 1960) 284 F2d 116, certiorari denied, 81 S. Ct. 814, 365 U.S. 850, 5 L.Ed. 814; Taylor v. Portwood (CA 10th Circ. - 1960) 284 F2d 952; Taylor v. Gill (CA 10th Circ. - 1961) 287 F2d 211; Schiffman v. Wilkinson (CA 9th Circ. - 1954) 216 F2d 589, certiorari denied, 75 S.Ct. 299, 348 U.S. 916, 99 L. Ed. 719.

However, the 8th Circuit has taken the position that any action by the parole board must be taken prior to the 180 day period set forth in 18 USC 4164. See Sprouse v. Settle (CA 8th Circ. - 1960) 274 F2d 681, wherein it was stated:=

> "In short, the object and consequence of the 1951 amendment to §4164 would seem to be simply to leave a prisoner not subject to the control, supervision and prescriptions of the Board during the last 180-days period of the maximum term or terms for which he was sentenced."

It is submitted that a review of the intent and purposes of Congress in the 1951 amendment to 18 USC 4164 requires that the same be interpreted as set forth by the Court of Appeals of the 8th Circuit in Sprouse v. Settle, Supra, and not in the manner set forth in the noted opinions of the 9th and 10th Circuits.

According to the opinions above noted in the 9th and 10th Circuits, it is the date of the parole violation itself which is critical, and under these opinions it would seem that a parolee might be retaken even after the maximum term of his sentence had expired, or even five or six years after the parole violation had occurred. 18 USC 3282 provides for a five year Statute of Limitation in connection with criminal offenses not capital, but these 9th and 10th Circuits opinions evidently hold that parole violations are not subject to any statute of limitations with respect to a retaking of the parolee for such violation. Where, as here, there was no attempt by the parolee to escape from or evade the jurisdiction of the parole board, and where the parole board had prompt knowledge of the alleged parole violations, the failure of the parole board to exercise its powers of revocation of parole

within a reasonable time after notice of the alleged parole violations constituted a waiver of its right to retake the parolee for such parole violations.

It is admitted that up until the last 180 days of Appellant's maximum sentence by the United States District Court for the Southern District of Texas he was subject to be retaken by the parole board by a timely warrant based on a parole violation. However, in order that Appellant be so retaken, it was necessary not only that he had violated the conditions of his parole (of which the parole board in this case had knowledge long prior to the beginning of the last 180 days of maximum sentence), but also that a warrant for such violation should have been issued against him before the 180 day period was reached.

Clearly, when the issuance and execution of the parole board violation warrant was held up by the parole board until after the beginning of the 180 day period as provided by 18 USC 4164, the parole board lost its jurisdiction to retake Appellant and he is therefore now being illegally detained and must be promptly released.

IV

The unconscionable delay of the parole board in exercising its powers of revocation of the parole of Appellant deprived Appellant of due process of law.

A parole board is under an absolute duty to act directly and precisely in the exercise of its powers relating to the curtailment or termination of the freedom of one of its charges. While it is recognized that parole under the terms of a conditional good-time release is a form of restricted freedom, so too must it be recognized that a parole board cannot arbitrarily compound the restrictions upon the freedom of a parolee.

The basic principle that no citizen of the United States can be permitted to enjoy his liberty only at the whim,sufferance or caprice of any other person or bodies of persons is too basic to require a citation of authority. Thus, parole officers, in exercising revocation of parole and imprisonment of a parolee who has violated the terms of his parole, may not withhold such action indefinitely and exercise it at some remote time.

In the present case, the alleged acts of Appellant which constituted the basis for revocation of his parole allegedly took place December 5, 1963 and January 9, 1964. The parole board was promptly notified of each alleged violation of parole. 201 days after the first alleged violation and 167 days after the second, on June 25, 1964, a parole board violation warrant was issued. During this entire period, from alleged violation to issuance of the parole board violation warrant, Appellant regularly reported to the patole board and otherwise lived up to the conditions of his parole.

It is respectfully submitted that the delay by tha parole board in exercising its power of revocation of the parole of Appellant was unconscionable and comprised an exercise of such power at the whim or caprice of the parole officers and deprived Appellant of due process of law. Cf. United States ex rel. Howard v. Ragen (DCND Illinois - 1945) 59 F. Supp. 374 and Colin v. Bannon (S. Ct. Michigan - 1953) 337 Mich.491, 60 N.W. 2d 431.

Accordingly, the parole of Appellant having been revoked without due process of law, the acts of the parole board in effecting such revocation, namely, the issuance and execution of the parole board violation warrant, must be set aside and annulled. Since the acts of the parole board in revoking Appellant's parole are a nullity, and since the maximum sentence under which Appellant was paroled has expired, Appellant must be released from illegal custody forthwith, for the parole board cannot revoke his parole after the expiration of the maximum sentence under which he was paroled. Anderson v. Williams (8th Circ.) 279 F 822, certiorari granted, 259 U. S. 579, 42 S. Ct. 590, 66 L. Ed. 1073, opinion, 263 U. S. 193, 44 S.Ct. 43, 68 L.Ed. 247.

CONCLUSION

It is respectfully submitted that:

1. 18 USC 4164 must be interpreted to mean that Appellant herein was unconditionally released from custody and jurisdiction of the parole board at the time of issuance and

execution of the parole board violation warrant whereby he is now being detained;

2. That, since Appellant was unconditionally released from custody and jurisdiction of the parole board at the time of issuance and execution of such warrant, no parole in fact existed at this time which could form a basis for execution of a parole board violation warrant; and

3. That the unconscionable delay by the parole board in exercising its power of revocation of the parole of Appellant comprised an exercise of such power at the whim or caprice of the parole officers and deprived Appellant of due process of law.

WHEREFORE, Appellant respectfully prays that a writ of habeas corpus issue herein, and that he forthwith be released from custody in which he is now being illegally detained.

Respectfully submitted,

s/ John M. Rommel

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July 2, 1965

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,323

KEYWORTH C. BIRCH, JR., APPELLANT

v.

SAM A. ANDERSON, APPELLEE

Appeal from the United States District Court for the District of Columbia

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United States Attorney.

FRANK Q. NEBEKER,
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PATRICK H. CORCORAN,
Assistant United States Attorneys.

H.C. No. 51-65

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

In view of 18 U.S.C. §§ 4164, 4205, may the Board of Parole issue a warrant of revocation during the last 180 days of appellant's sentence, based on violations of parole occurring before the last 180 days of the sentence, and executed upon appellant after the scheduled expiration date of his original maximum sentence while in custody pursuant to a conviction for one of the violations?

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,323

KEYWORTH C. BIRCH, JR., APPELLANT

v.

SAM A. ANDERSON, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 2, 1965, appellant filed a petition for a writ of habeas corpus alleging that he was unlawfully detained in that the board of parole illegally issued a parole revocation warrant after the term of his parole had expired. The District Court ordered the rule to show cause be discharged and the petition dismissed on February 19, 1965. This appeal followed.

Appellant was convicted in the United States District Court for the Southern District of Texas of violations of the federal narcotic laws and on September 17, 1959, was sentenced to serve a term of five (5) years imprisonment.

On February 18, 1963, appellant was released on a conditional good-time release. Arrested on January 9, 1964, in the District of Columbia for violation of the Uniform Narcotics Act, appellant was convicted on June 5, 1964, and sentenced to serve 360 days imprisonment (Criminal Case No. U.S. 1284-64). A board of parole warrant was issued on June 25, 1964, and was executed on December 18, 1964, appellant then being held in custody. The warrant was based on appellant's arrest on January 9, 1964, for which he had subsequently been convicted on June 5, 1964, and an arrest on December 5, 1964.

STATUTES INVOLVED

Title 18, United States Code, Section 4164, provides:

> A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.
>
> This section shall not prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.

Title 18, United States Code, Section 4205, provides:

> *Retaking parole violator under warrant; time to serve undiminished.*
>
> A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve. June 25, 1948, c. 645, 62 Stat. 854. 18 U.S.C. §§ 717, 723 c (June 25, 1910, c. 387, § 4, 36 Stat. 820; May 13, 1930, c. 255, §§ 1, 3, 46 Stat. 272; June 29, 1940, c. 449, § 1, 54 Stat. 692)

Act of June 25, 1910, c. 387, § 4, 36 Stat. 820, provides:

> That if the warden of the prison or penitentiary from which said prisoner was paroled or said board of parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner.

Act of May 13, 1930, c. 255, § 3, 46 Stat. 272, provides:

> The said board, or any member thereof, shall hereafter have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve.

Title 18, United States Code, Section 4207, provides:

> *Revocation upon retaking parolee.*
>
> A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.
>
> The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.
>
> If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.

SUMMARY OF ARGUMENT

18 U.S.C. § 4164 was enacted to save the expense of returning a prisoner to custody for six months or less and to relieve probation officers of the burden of supervising the prisoner for this short period. It was not directed to a prisoner who violates his parole before the last 180 days

of his sentence and does not address itself to the question of when a warrant of revocation must issue, which is specified by 18 U.S.C. § 4205 as "[w]ithin the maximum term or terms for which he [the prisoner] was sentenced."

Violation of parole interrupts the service of the sentence and continues the authority of the board of parole over the prisoner until the expiration of the sentence. When appellant violated his parole his sentence was interrupted, he never came under the mandate of § 4164, and the board of parole properly issued a warrant of retaking prior to the expiration of his maximum sentence. The board of parole could await the expiration of appellant's newly imposed sentence before executing its warrant and conducting an informal hearing.

ARGUMENT

The Board of Parole properly issued its warrant prior to the expiration of appellant's maximum sentence and executed it upon appellant while in custody for a conviction based upon his violation of parole.

The board of parole warrant of revocation was based upon breaches of parole committed on December 5, 1964, and January 9, 1964, before the expiration of appellant's minimum sentence (maximum sentence less 180-days) on March 22, 1964. Upon appellant's conviction of one of the breaches on June 5, 1964, the warrant was issued on June 25, 1964, during the 180 days period preceding the expriation of the maximum sentence on September 17, 1964, and executed on December 18, 1964, upon appellant while in custody after the expiration of the maximum sentence. Appellant contends that pursuant to 18 U.S.C. § 4614 the board of parole lost authority over him on March 22, 1964, (maximum sentence less 180 days) and that accordingly the warrant of revocation was illegally issued on June 25, 1964.

The desire to save the expense of returning a prisoner to custody, and to relieve probation officers of the burden

of supervision during the last 180 days of a prisoner's sentence, were the motivating factors in the enactment of 18 U.S.C. § 4164. The benefit to society was not considered justified by the incarceration for six months or less or a prisoner having 180 days or less to serve.[1] It was expected that the prisoner upon reaching the last 180 days of his sentence would have a good-conduct record.[2] To the extent that this statute was concerned with parole violations, it was directed to the situation where the violations occurred during the last 180 days of a prisoner's maximum sentence, and as to these the board of

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[1] "[L]ittle is accomplished by retaining released prisoners under supervision for a few months and returning them to prison for such short periods in the event of violation of conditions of release. Considerable expense is incurred by the Federal Probation Service in attempting to supervise them, and by the Department of Justice in committing them and supporting them as violators for such short periods. With only a short time remaining to be served nothing more can be done for the individual prisoner by way of rehabilitation and his return to custody for this relatively short time serves only to aggravate his resentment against society and makes it more difficult for him to adjust himself when finally released. We have concluded, therefore, that the benefit to society by further incarceration for 6 months or less does not justify the expense of returning the offender to custody, and the trouble involved in supervising a much larger number who do not get into trouble." H.R. Rep. No. 314, 82d Cong., 1st Sess. 2 (1951).

"It is the desire to relieve these various groups from the work involved as well as save the expenses, which actuated approval of the proposed amendment. If we could see any worth-while results in the rehabilitation of this group of prisoners, the amendment would not have been approved, but experience in the past 19 years has led us to believe that the 'game is not worth the candle.'" H.R. Rep. No. 314, 82d Cong., 1st Sess. 4 (1951).

[2] "MR. BRYSON: Well, that is the purpose of it. If the man has less than 180 days after he has been paroled, then he would not be required to remain under the supervision of the parole board.

MR. CUNNINGHAM: If he has 180 days remaining and he has a good-conduct record, he is automatically a free man if this bill passes.

MR. BRYSON: That is right." 97 Cong. Rec. 3987-3988 (1951).

parole could exercise no authority over the violator.[3] But a prisoner who, having more than 180 days remaining to be served, violated his parole was not contemplated or encompassed by § 4164. As to him, the duration of the subsequent incarceration could be substantially longer than 180 days (see 18 U.S.C. § 4207) and therefore the factors of expense in returning him to custody and the burden of supervision for a short period of time underlying the enactment of § 4164 would not be applicable.

Moreover, appellant's violation of parole prior to the last 180 days of his sentence precluded him from coming under the mandate of § 4164. Allowance of good time is not a vested right but is contingent upon the good behavior of the prisoner. *Aberhold* v. *Perry*, 59 F.2d 379 (5th Cir. 1932); *Anderson* v. *Anderson*, 8 F. Supp. 812 (D. Minn. 1934); see *Woykovsky* v. *Chappell*, —— U.S. App. D.C. ——, 336 F.2d 927 (1964), *cert. denied*, 380 U.S. 916 (1965). By violation of his parole appellant's rights and status became analogous to those of an escaped convict, and "[E]scape from prison interrupts service and the time elapsing between escape and retaking will not be taken into account or allowed as a part of the term." *Anderson* v. *Corall*, 263 U.S. 193, 196 (1923); *Nicholson* v. *Dillard*, 102 F.2d 94 (4th Cir. 1939). Appellant's misconduct prevented the completion of his original sentence and continued the authority of the board of parole over him until the sentence was completed and expired.

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[3] "The reason 180 days—6 months—was selected, was largely because the Board of Parole is required by section 4027, title 18, of the United States Code, to give violators an opportunity to appear before it. The Board is then authorized to revoke the order of release or modify the terms and conditions thereof. The Board as a rule has hearings at each institution once every 3 months, at which time they must give the violator an opportunity to be heard. A decision as to revocation or modification is made in Washington after such hearing and, unless there are complications, it is usually disposed of within a couple of weeks after the return of the Board member who heard the case. When decision is finally made there is not much time left to do anything with the prisoner before his 180 days have expired." (H.R. Rep. No. 314, 82d Cong., 1st Sess. 3 (1951).

Zerbst v. *Kidwell*, 304 U.S. 359, 361-362 (1938); see *Washington* v. *Clemmer*, 83 U.S. App. D.C. 268, 169 F.2d 300 (1948). Therefore, the violation of parole by appellant occurring more than 180 days before the expiration of the maximum sentence authorized the board of parole at any time within the maximum sentence to issue a warrant revoking parole which could result in a forfeiture of all allowance for good time.[4] 18 U.S.C. § 4205; *Taylor* v. *Godwin*, 284 F.2d 117 (10th Cir. 1960); *Schiffman* v. *Wilkinson*, 216 F.2d 589 (9th Cir.), *cert. denied*, 348 U.S. 916 (1954); see *Frierson* v. *Rogers*, 289 F.2d 234 (5th Cir. 1961); *Morneau* v. *United States Board of Parole*, 231 F.2d 829 (8th Cir.), *cert. denied*, 352 U.S. 861 (1956).[5]

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[4] Appellant relies upon the case of *Sprouse* v. *Settle*, 274 F.2d 681 (8th Cir. 1960) for the proposition that the warrant of retaking must issue before the expiration of the minimum sentence. While the language may be susceptible to this construction, it should be noted that *Sprouse* cites the case of *Schiffman* v. *Wilkinson*, *supra*, with apparent approval, and that the court was not presented with the same factual situation as this case. To interpret § 4164 to mean that a warrant must issue before the last 180 days of a prisoner's sentence because once this period is reached the board of parole has lost all authority over appellant must logically also mean that the warrant of revocation must be executed before the 180 days period while the board still has authority over appellant. The *Sprouse* case did not reach this conclusion.

[5] 18 U.S.C. § 4205 is based on 18 U.S.C., 1940 ed., §§ 717, 723c (June 25, 1910, c. 387, § 4, 36 Stat. 820; May 13, 1930, c. 255 §§ 1, 3, 46 Stat. 272; June 29, 1940, c. 449, § 1, 54 Stat. 692). In pertinent part c. 387, § 4, 36 Stat. 820 provides: "[t]hen said warden, *at any time within the term or terms of the prisoner's sentence, may issue his warrant* . . . . ." 18 U.S.C. § 4205 continues this authority, providing in pertinent part: "A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member there of *and within the maximum term or terms for which he was sentenced*." (Italics added). Except for minor changes in phraseology, § 4205 is a reiteration of 18 U.S.C. 1940 ed., §§ 717, 723 c. In construing both, the courts have reached the result detailed above. For cases reaching this result under 18 U.S.C. 1940 ed., § 717, 723 see *Christianson* v. *Zerbst*, 89 F.2d 40 (10th Cir. 1937); *Anderson* v. *Anderson*, 76 F.2d 375 (8th Cir. 1935); *Anderson* v. *Anderson*, *supra*. And under 18 U.S.C. § 4205, 1948, see *Nave* v. *Bell*, 180

If as a result of the breach of parole the prisoner is convicted and imprisoned, his sentence does not continue to run concurrently with the one newly imposed, and upon completion of the second sentence the board of parole may execute its warrant and take him into custody. *Zerbst* v. *Kidwell, supra; Woykovsky* v. *Chappell, supra; Avellino* v. *United States*, 330 F.2d 490 (2d Cir. 1964); *Johnson* v. *Wilkinson*, 279 F.2d 683 (5th Cir. 1960).

Appellant concedes that he could be retaken into custody for the breach of parole (Br. 14), and it is evident that the execution of the warrant of retaking, even if issued prior to the last 180 days of his sentence, could be delayed until the expiration of the sentence imposed as a result of the breach of parole, which expiration could, in many cases, be years after the scheduled expiration of the original maximum sentence. Therefore, whether this warrant issued before or during the last 180 days of appellant's sentence could not result in prejudice to appellant, for it is not until the warrant is executed and appellant retaken into custody that a hearing is held. See 18 U.S.C. § 4207.

Where, as here, the violation results in a conviction, appellant is entitled to no more than an "informal hearing." See *Hyser* v. *Reed*, 115 U.S. App. D.C. 254, 318 F.2d 225, 255-256 (1963) (concurring and dissenting opinion of Judge Bazelon and Judge Edgerton). And this hearing may be deferred to the expiration of the new sentence. *Washington* v. *Clemmer*, *supra*. To require immediate execution of the warrant of revocation would be to permit appellant to serve both sentences concurrently, thereby nullifying to a great extent the effect of a revocation of parole.* To require, as appellant urges, the

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F.2d 198 (6th Cir. 1950). There is no indication that Congress in enacting § 4164 considered or intended to revoke § 4205. § 4164 does not address itself to the question of when a warrant of revocation must issue, nor does it disturb the settled principle that a violation of parole interrupts the service of the sentence.

* Appellant relies on the cases of *Howard* v. *Ragen*, 59 F. Supp. 374 (N.D. Ill. 1945) and *Colin* v. *Bannon*, 337 Mich. 491, 60 N.W. 2d 431 (1953) for the proposition that the delay in revocation of

board of parole to issue the warrant immediately upon learning of the charges against appellant would encourage premature action. Where, as here, the board defers action to the determination of the charges by the Court, it permits the proceedings to progress with a minimum of delays and interferences while providing itself with the benefit of further information which may be developed in the proceedings. Cf. *Avellino* v. *United States, supra.* Moreover, it prevents an unjust result should the board make a prior determination which was at variance with the Court's subsequent finding.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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appellant's parole constituted a violation of due process. Both cases involved extraordinary situations where parole boards had previously declined to take a prisoner into custody after his conviction and service of another sentence while on parole, in the first instance because of a state policy against retaking parolees who were convicted in out of state courts, and in the second because funds were not available. In this case the warrant was issued immediately upon appellant's conviction and executed upon him while still in custody under this conviction.

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REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

APPEAL NO. 19,323

HABEAS CORPUS 51-65

Keyworth C. Birch, Jr.,

Appellant

v.

Sam A. Anderson,

Appellee

APPEAL FROM A JUDGMENT OF THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

John M. Rommel
815 15th Street,N.W.
Washington, D.C. - 20005
Attorney for Appellant
(Appointed by this Court)

August 26, 1965

TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

The copy of Appellee's brief forwarded to counsel for Appellant did not contain numbered pages, rendering it rather difficult to specifically refer to various points raised. For the purposes of reference, the pages thereof will be referred to as being consecutively numbered with page 1 being the page immediately following the cover page.

Appellee has attempted to somewhat befog the issues herein involved with unrelated points concerning the contingent nature of allowance of good time (BR-7); the matter of escaped convicts (BR-7); and the concurrent running of sentences (BR-8). This case obviously does not involve these points, and it is submitted that a parolee who regularly reports to his parole board cannot and must not be either equated with or placed in the same category as an escaped convict. These various incidental points were obviously raised by Appellee in an effort to "beef-up" the brief to give an impression of over-all settled law regarding the rights of parolees.

It is recognized that the matter of parole and administration of a parolee involve many facets. The basic issue with which we are herein concerned is whether an alleged parole violation tolls the 180 day period specified in 18 USC 4164. It is Appellant's position that it does not.

As conceded in Appellant's brief (BR-10), 18 USC 4164 (as amended) was intended to take care of a situation which the

government found inconvenient. Such amendment could have vested discretion as to the release or retaking of parolees thereunder, but it did not. The matter of convenience was rigidly bound to unconditional release of parolee's affected thereby, and these bonds cannot be dissolved by judicial fiat.

Appellant herein is not seeking to force a parole revocation hearing prior to a determination by a Court regarding a charge based on a parole violation. This would obviously be prejudicial to both of the parties litigant. The matter of premature or prejudicial action is not involved if it is required that a parole violation warrant be issued prior to the 180 day period specified in 18 USC 4164.

It would not seem at all difficult, unusual, or extra-, ordinary for a parole board to issue a violation warrant when it had reason to believe that parole may have been violated. In this case, within a reasonable time after December 5, 1963 and/or January 9, 1964. It could then be provided that a revocation hearing be held within a reasonable time after a decision by the Court with respect to the offenses which were believed to constitute a violation of parole. Custody and jurisdiction over the parolee could thus be maintained even into the 180 day period specified in 18 USC 4164, and through any trial delays, appeals, etc.

It is abundantly clear that the action taken by a defendant in connection with a misdemeanor for which he is likely to receive a 30 day or 90 day sentence will not be as acute as

those actions which he may take in connection with a matter for which he is liable to imprisonment for 576 days. The rights of a parolee may therefore be prejudiced when the formal charge of parole violation is unreasonably and unjustifiably delayed to within the 180 day period specified in 18 USC 4164 for an alleged parole violation occurring prior to such 180 day period.

It has been repeatedly held by this Court that:

> ".... due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused...."
>
> Nickens v. United States (CA D.C.-1963) 116 U.S. App.D.C. 338,323 F2d 808; and Ross v. United States (CA D.C.-1965) (decided June 30, 1965)

It is obvious that some charges of parole violation are rebuttable, not clear cut. For instance, the alleged parole violation of Appellant of December 5, 1963, in which an arrest was made but the case was dropped for lack of evidence. If such a matter is to be a basis for parole revocation, it is mandatory that the parolee be promptly so advised in order that he can marshal and preserve any evidence which exists to refute the charge of parole violation. Even when a parolee has been convicted of a charge, certain extenuating circumstances may exist, and here again he should be promptly advised that such charge may be a basis for parole revocation.

The necessity for a formal charge of parole violation is acutely evident in a case such as that of Appellant, when the

parolee may have been lulled into a false sense of security and permitted favorable evidence to evaporate due to the fact that the 180 day period of 18 USC 4164 had been entered and no charge of parole violation had been brought.

It is thus apparent that a parolee will be prejudiced and that due process is denied to him when a formal charge of parole violation, namely, the issuance of a parole violation warrant, is delayed for an unreasonable time. Appellant herein has suffered such prejudice and denial of due process and relief must be given to him by granting of the requested writ.

Some instances of de facto parole violation are not regarded by the parole board as sufficiently serious to warrant revocation of parole. The burden of separating the wheat from the chaff cannot be laid at the door of the parolee, but must be shouldered by the parole board. So too must it be held that some positive act by the parole board is a prerequisite to the tolling of the 180 day period specified in 18 USC 4164.

Appellee has endeavored to minimize the fact that the arrest of December 5, 1964 forms a part of the basis for revocation of parole. Such arrest was not followed by conviction, the charge being dropped for lack of evidence, and yet no parole revocation hearing regarding the same was held until May 29,1965, more than 17 months after such alleged violation of parole.

Insofar as the cases of Zerbst v. Kidwell, 304 U.S.359 361-362 (1938) and Washington v. Klemmer, 83 U.S.App.D.C.268, 169 F2d 300 (1948) are concerned, these cases have nothing whatsoever to do with the matter of interpretation of 18 USC 4164.

As regards the citation of Schiffman v. Wilkinson, (CA 9th Circ. - 1954) 216 F2d 589, certiorari denied, 75 S.Ct. 299, 348 U.S. 916, 99 L.Ed. 719, in the case of Sprouse v. Settle (CA 8th Circ. - 1960) 274 F2d 631, the same was cited for a point not related to an interpretation of the 180 day period specified in 18 USC 4164, as is obvious from the fact that the Sprouse case interpreted the same in a manner which is diametrically opposed to the Schiffman case.

Appellee has alleged (BR-9) that when a parole violation results in a conviction, the parolee is entitled to no more than an "informal hearing". If this is the case, then it becomes obvious that a parole revocation hearing becomes a mere formality, and the issuance of a parole violation warrant becomes the critical step in the retaking of a parolee. When the issuance of such parole board violation warrant is delayed at the whim and caprice of the parole board, and particularly when the same is delayed to a time when the parolee has been unconditionally released from the custody and jurisdiction of the parole board, such warrant is void and invalid, and must be quashed.

18 USC 4205 was on the books long before 18 USC 4164 and 18 USC 4164 must be read as a further prescription on the powers of a parole board, limiting such power to actions in advance of the 180 day period specified in 18 USC 4164 and prior to the time that the parolee is unconditionally released as specified in 18 USC 4164. In order that 18 USC 4205 be read consistently with 18 USC 4164, the phrase "maximum term or terms" of 18 USC 4205 must be construed as encompassing a remittance of the 180 day period of 18 USC 4164.

If it is not, then according to 18 USC 4205, a valid warrant for retaking might be issued during the 180 day period of 18 USC 4164 for a violation which occurred during such 180 day period.

As set forth in Appellant's main brief (BR-11), 18 USC 4164 comprises an expiration, by operation of law, of the maximum term imposed by the United States District Court for the Southern District of Texas, as of March 22, 1964. Accordingly, all actions taken by the parole board with respect to Appellant subsequent to March 22, 1964 are a nullity.

It is thus respectfully submitted that the judgment of the District Court should be reversed and Appellant released from the illegal custody in which he is now being detained.

Respectfully submitted,

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August 26, 1965